No. 08-_____ 08-981 JAN 30 2009

In The
Supreme Court of the United States

FATHI Y.M. YUSUF, WALEED M. HAMED, WAHEED M. HAMED, MAHER F. YUSUF, NEJEH F. YUSUF, and UNITED CORPORATION d/b/a PLAZA EXTRA,

Petitioners,

v.

UNITED STATES and GOVERNMENT OF THE VIRGIN ISLANDS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

GORDON C. RHEA
RPWB LAW OFFICES
P.O. Box 1007
Mount Pleasant, SC 29465

RANDALL P. ANDREOZZI
ANDREOZZI FICKESS LLP
9145 Main Street
Clarence, NY 14221

PETER GOLDBERGER
Counsel of Record
50 Rittenhouse Place
Ardmore, PA 19003-2276
(610) 649-8200

THOMAS ALKON
2115 Queen Street
Christiansted, St. Croix
U.S. Virgin Islands 00820

Attorneys for Petitioners

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QUESTION PRESENTED

To be "proceeds" of unlawful activity under the money laundering statute, 18 U.S.C. § 1956(a), must funds constitute "profits" derived from the "gross proceeds" of criminal conduct after payment of expenses, or does "proceeds" in the sense of "profits" also encompass an amount of money, in whatever form, equal to the liability avoided through nonpayment of taxes?

LIST OF ALL PARTIES

The caption of the case in this Court contains the names of all parties (the five individual petitioners, the corporate petitioner, and the two respondent governments, the United States and the Territory of the United States Virgin Islands). A seventh defendant, Isam M. Yousuf, is believed to be outside the jurisdiction and has not made an appearance in either of the courts below.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Fathi Yusuf, Waleed Hamed, Waheed Hamed, Maher Yusuf, Nejeh Yusuf, and United Corporation respectfully petition this Court jointly for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit reversing an order which dismissed the money laundering counts in a pending indictment against them.

OPINIONS BELOW

The Third Circuit's precedential opinion (per Roth, J., with Smith & Nygaard, JJ.) was filed on June 17, 2008, and amended July 21, 2008; see *United States v. Yusuf*, 536 F.3d 178; Appx. 1. The opinion and order of the United States District Court for the Virgin Islands (Finch, J.), filed February 13, 2007, are not published. They are reprinted in the Appendix, at 27-47. The district court's memorandum on denial of reconsideration, filed June 25, 2007, is Appendix 48-51.

An earlier opinion of the district court granting a suppression motion is available at 2005 WL 1592928 (D.V.I. 2005). The opinion of the Third Circuit reversing that order is published at 461 F.3d 374 (3d Cir. 2006). *See also* 199 Fed. Appx. 127 (3d Cir. 2006) (opinion remanding for hearing on defendants' motion for release of funds from preliminary restraint). The

latter three opinions are not included in the Appendix, as they do not underlie the instant petition.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit reversing the order of the United States District Court for the Virgin Islands was filed and entered on June 17, 2008, and amended July 21, 2008. Appx. 1. A petition for rehearing was filed, but was denied on September 2, 2008. Appx. 52. On November 25, 2008, under No. 08A461, Justice Souter extended until January 30, 2009, the date for filing this petition. The petition is being filed by postmark on or before that date. Rules 13.1, 13.3, 13.5, 29.2, 30.1. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

TEXT OF FEDERAL STATUTES INVOLVED

The pertinent subsection of **the Money Laundering Control Act**, which is **Title I, Subtitle H, of the Anti-Drug Abuse Act of 1986**, Pub.L. No. 99-570, § 1352, 100 Stat. 3207-18, provides:

> (2) Whoever transports, transmits, or transfers, or attempts to transport, transmit, or transfer, a monetary instrument or funds from a place in the

United States to or through a place outside the United States . . . –

* * *

(B) knowing that the monetary instrument or funds involved in the transportation, transmission, or transfer represent the proceeds of some form of unlawful activity and knowing that such transportation, transmission, or transfer is designed in whole or in part –

(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity;. . . .

* * *

shall be sentenced to a fine . . . or imprisonment . . . or both.

18 U.S.C. § 1956(a)(2)(B)(i).

The definitions in § 1956 of title 18 provide, in part:

(c) As used in this section –

* * *

(7) the term 'specific unlawful activity' means –

(A) any act or activity constituting an offense listed in section 1961(1) of this title except an act which is indictable

> under subchapter 11 of chapter 53 of title 31. . . .

The incorporated list of criminal activities in 18 U.S.C. § 1961, the Racketeer Influenced and Corrupt Organizations ("RICO") Act, in turn, includes "(B) any act which is indictable under any of the following provisions of title 18, United States Code: . . . section 1341 (relating to mail fraud). . . ." 18 U.S.C. § 1961(1). No tax offenses are included in § 1956(c)(7) or listed in § 1961(1).

STATEMENT OF THE CASE

This petition arises out of a criminal tax prosecution which is pending in the United States District Court for the Virgin Islands. The district court dismissed the money laundering counts (and related forfeiture averments) from the indictment, but the Third Circuit reversed.

a. Procedural History

Six members of the Yusuf family and the corporation through which they own and operate three grocery stores were charged in the federal court in the Virgin Islands in a 78-count superseding indictment with various territorial and federal tax offenses, with mail fraud consisting of mailing false tax returns, and with charges of "international money laundering" predicated on the retained "proceeds" of the mail fraud. Thus, violations of Virgin Islands tax

law are charged both under 18 U.S.C. § 1341 as mail fraud and under a Virgin Islands statute, 33 V.I.C. § 1525(2) (false returns). The money laundering is charged under 18 U.S.C. § 1956(a)(2)(B)(i) – the international transfer of funds representing the "proceeds" of the mail fraud, with intent to conceal or disguise their location or ownership.

The indictment further charges petitioners with causing the filing of false federal and local tax returns (26 U.S.C. § 7206(2); 33 V.I.C. § 1525(2)) and structuring of currency transactions (31 U.S.C. § 5324). The indictment also charges three of the individual petitioners and United Corporation with racketeering under territorial law (14 V.I.C. § 605(a)) – the "enterprise" being petitioner United and other corporations, and the pattern of unlawful activity being the other offenses charged in the indictment. Finally, the indictment includes four separate conspiracy counts – under 18 U.S.C. § 371 (conspiracy to commit mail fraud and structuring), § 1956(h) (money laundering conspiracy); 14 V.I.C. § 605(d) (conspiracy to conduct racketeering enterprise); and 33 V.I.C. § 1522 (conspiracy to evade territorial taxes). Petitioner Nejeh Yusuf is also charged in one count of endeavoring to obstruct justice, for allegedly giving false testimony at a pretrial hearing (18 U.S.C. § 1503). Finally, the indictment also includes criminal forfeiture averments under 18 U.S.C. § 982 and 14 V.I.C. § 606.

On motion of the defendants, the district court dismissed the counts charging money laundering,

money laundering conspiracy, and the related criminal forfeitures. Appx. 45. The district court denied the government's motion to reconsider, Appx. 47, but the Third Circuit sustained the government's interlocutory appeal and reversed. Appx. 1-26. The Third Circuit premised its ruling on this Court's recent decision in *United States v. Santos*, 553 U.S. — , 128 S.Ct. 2020 (2008). Under *Santos*, the term "proceeds" as used in 18 U.S.C. § 1956, the principal federal money laundering statute, means "profits" not "gross proceeds," at least in the absence of specific legislative history showing otherwise with respect to "proceeds" of a particular form of underlying "specified unlawful activity." The court below thus recognized that *Santos* overruled prior Third Circuit precedent in that regard. Appx. 9, 16; 536 F.3d at 186 n.12. However, the court rejected the appellees' (now petitioners') argument that under *Santos* "profits" in this sense always means "net proceeds," that is, profits retained, after expenses, from the gross proceeds of criminal activity. Appx. 12-24; 536 F.3d at 186-90.

A petition for rehearing en banc was denied. Appx. 52. This petition follows.

b. Statement of Facts

Because this case arises in a pretrial setting, no "facts" have been established. The seven defendants are identified in the Third Circuit's decision in the following terms:

> (1) United Corporation, a family-owned business located in the Virgin Islands that operates a chain of three Plaza Extra Supermarket stores in St. Thomas and St. Croix; (2) Fathi Yusuf, the primary shareholder of United; (3) Maher 'Mike' Yusuf, Fathi's son, who is a part-owner of United and manager of one of the Plaza Extra stores; (4) Waheed 'Willie' Hamed, Fathi's nephew, who manages the second Plaza Extra store; (5) Waleed 'Wally' Hamed, Fathi's nephew and Waheed's brother, who manages the third Plaza Extra store; (6) Isam 'Sam' Yousef, Fathi's nephew, who is a resident of St. Maarten, Netherlands Antilles, and owns and operates a retail furniture and appliances store; and (7) Nejeh Fathi Yusuf, Fathi's son, who is an owner and employee of United and who participated in the operation of the Plaza Extra stores.

Appx. 3; 536 F.3d at 181. The government's factual theory of the case was summarized by the court below, from the allegations of the superseding indictment, as follows:

> Because defendant United conducts business through its Virgin Islands supermarkets, it is required to comply with statutorily-mandated monthly reporting of gross receipts and payment of tax on those receipts. Section 43(a), Title 33, of the Virgin Islands Code provides, in pertinent part, that '[e]very individual and every firm, corporation, and other association doing business in the Virgin Islands shall *report their gross receipts* and *pay a tax of four percent (4%) on the gross receipts* of such business.' 33 V.I.C.

> § 43(a) (emphasis added). Section 44(c) provides for monthly returns and payments and states that '[t]he returns and payments required by this subsection shall be due within 30 calendar days following the last day of the calendar month concerned.' 33 V.I.C. § 44(c). Thus, taxes imposed on United's gross sales receipts from its supermarkets during a particular month were due and payable on the last day of the following month.
>
> . . . [The] defendants allegedly conspired to avoid reporting $60,000,000 of the supermarkets' gross receipts on United's Virgin Islands gross receipts monthly tax returns and failed to pay the Virgin Islands government the 4% tax that United owed on those unreported gross receipts. The . . . defendants allegedly engaged in various efforts to disguise and conceal the illegal scheme and its proceeds. Such efforts included allegedly depositing [the tax savings] into bank accounts, controlled by defendants, outside of the United States.

Appx. 3-5; 536 F.3d at 181-82 (footnotes omitted). The claimed facts of the alleged money laundering activity are not described in the opinion, and the indictment says only this:

> On or about the dates listed in each count below, in the District of the Virgin Islands and elsewhere, the [defendants] transported and transferred, and attempted to transport and transfer, monetary instruments and funds in amounts described below from a place in the

> United States, specifically the United States Virgin Islands, to and through a place outside the United States, specifically, Amman, Jordan, knowing that the monetary instruments and funds involved in the transportation and transfer represented the proceeds of some form of unlawful activity and knowing that such transportation and transfer was designed in whole or in part to conceal and disguise the nature, location, source, ownership, and control of the proceeds of a specified unlawful activity, that is, mail fraud, in violation of Title 18, United States Code Section 1341.

Appx. 7-8; 536 F.3d at 183. The nature of what was transported, how it was transported, how the "transportation and transfer" was "designed . . . to conceal,"[1] to what sort of place or institution in Amman it was transported, and so forth, are not described.

c. Statement of Lower Court Jurisdiction Under Rule 14.1(g)(ii)

The subject matter jurisdiction of the United States District Court for the Virgin Islands rests upon 48 U.S.C. § 1612(a), (c); the indictment alleges federal and territorial offenses committed in the district. The government's appeal from the dismissal of certain counts of the indictment invoked the Third Circuit's

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[1] See *Regalado Cuellar v. United States*, 553 U.S. — , 128 S.Ct. 1994 (2008).

jurisdiction under 18 U.S.C. § 3731 and 28 U.S.C. § 1294(3); *see also* 48 U.S.C. § 1493.

REASONS FOR GRANTING THE WRIT

The opinion of the court below conflicts with that of the Eleventh Circuit in *United States v. Khanani*, 502 F.3d 1281 (11th Cir. 2007), and with a formal confession of error made to the Fifth Circuit (see *United States v. Smith*, 1994 WL 442415, *1 (5th Cir. 1994) (per curiam) (*noted at* 32 F.3d 566)). It also takes this Court's narrowing construction of 18 U.S.C. § 1956 last Term in *United States v. Santos*, and misuses that decision, in disregard of its underlying precepts, as a justification to expand the reach of the money laundering statute. For either or both reasons, this petition for certiorari should be granted.

1. This case provides a suitable opportunity for the Court to resolve at least some of the uncertainty and confusion engendered by the split decision last Term in *United States v. Santos*, 553 U.S. — (2008).

In *United States v. Santos*, 553 U.S. — , 128 S.Ct. 2020 (June 2, 2008), the Court held – on review of a motion under 28 U.S.C. § 2255 – that "proceeds," as used in the federal money laundering statute, 18 U.S.C. § 1956(a), means *profits* rather than *gross*

receipts,[2] at least (as reserved in Justice Stevens' concurring opinion) in the absence of specific legislative history showing otherwise with respect to "proceeds" of a particular form of underlying "specified unlawful activity."[3] And as the plurality pointed out, eight Justices were in agreement (that is, the plurality plus the dissenters) that whatever "proceeds" means in § 1956, it should be the same in all cases. *Id.*[4] Of course, the Court split 4-4 on what that single meaning should be. As a result of this unusual split in the vote, the lower courts are left wondering how to apply *Santos* to cases involving alleged laundering of "proceeds" of other sorts of illegal activity.

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[2] The subsection of the money laundering statute at issue in petitioners' case is § 1956(a)(2)(B)(i), not subsection (a)(1)(A)(i), as in *Santos*. The logic of this Court's decision, however, has nothing to do with which subsection of § 1956 was charged, as long as that subsection requires proof of "proceeds." Nor is *Santos* inapplicable where, as in one count in the instant case, the charge is conspiracy to conduct transactions with "proceeds"; one of the counts overturned in *Santos* charged a § 1956(h) conspiracy. *See* 128 S.Ct. at 2023.

[3] As the plurality stated, "The narrowness of [the fifth-vote concurrence] consists of finding that 'proceeds' means 'profits' when there is no legislative history to the contrary. That is all that our judgment holds. It does not hold that the outcome is different when contrary legislative history does exist." *Id.* 2031.

[4] One possible reading of *Santos* is therefore easily rejected: that it construes "proceeds" only as applied to federal gambling prosecutions. Even the court below rejected that unreasonably narrow interpretation, although it has been advanced by the government in other cases.

Eventually, unless the matter is resolved by statutory amendment, the Court will probably have to take a case involving the laundering of drug proceeds and try again to reach a majority position.[5] Meanwhile, granting certiorari in the instant case would be a useful first step.

Cases of this kind, where the government alleges that a tax evasion scheme (charged as mail fraud) has "proceeds" in the form of liabilities avoided, present another manifestation of what the *Santos* opinions refer to as the "merger problem." 128 S.Ct. at 2026-28; see also *id.* at 2034-35 (Breyer, J., dissenting). An ongoing scheme to underreport and underpay taxes often involves, but – unlike an unlawful gambling business, as in *Santos* – does not always require that the tax evader engage in, transactions resembling money laundering to complete the commission of the offense and achieve its goals. But tax offenses, as such, are not predicates for money laundering. Where, as here, the government charges a mail fraud scheme consisting of tax evasion, and then predicates

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[5] Interestingly, the recognition of a unique exception to the majority position, reserved by Justice Stevens for contraband cases, would be consistent with the Internal Revenue Code's treatment of the deductibility of expenses of illegal businesses, and thus the taxability of their proceeds. For most criminal enterprises, "ordinary and necessary" expenses are deductible like those of any other business under 26 U.S.C. § 162. But under a 1982 amendment to the Internal Revenue Code, the equivalent expenses of an illegal drug distribution business are not deductible. *Id.* § 280E.

a money laundering theory on the "proceeds" of that scheme, conceived as "tax savings," merger arises as problematically as in any other case. For example, in petitioner's indictment, the "Background" allegations describe check-cashing, deposits in foreign bank accounts, and smuggling of cash as essential aspects of the overall scheme. *E.g.*, Third Supers. Ind. ¶¶ 17, 18, 20, at 6-7. Likewise, the indictment charges the same transportation of funds which constitutes the alleged money laundering of "proceeds" (Counts 44-52, at 20) as overt acts in furtherance of the mail fraud conspiracy. *E.g.*, Third Supers. Ind. ¶ 26.c,d,f,g,i,j,k,l, at 11-12. The merger problem as manifested in this case well illustrates how the decision below is inconsistent with this Court's teaching in *Santos*.

The plurality in *Santos*, invoking the rule of lenity, also explained that it chose the "profits" definition of "proceeds" because "it is always more defendant-friendly than the 'receipts' definition." 128 S.Ct. at 2025. Yet in the decision below, the Court of Appeals chose the *less* "defendant-friendly" definition, by ripping the concept of "profits" loose entirely from the notion of "proceeds," in the fundamental sense of "gross receipts."

Thus, the court below took this Court's holding that "proceeds" means "profits" entirely out of context. The Third Circuit decided that "profits" consisting of tax savings can be the subject of money laundering even when the "specified unlawful activity" (underlying illegal activity), that is, the "mail fraud scheme" to evade the Virgin Islands gross

receipts tax, has no "proceeds" at all in the ordinary sense of the word. And in particular, "tax savings" or "liabilities avoided" are not proceeds that can be concealed, laundered or disguised. Nor is it possible to identify such incorporeal "proceeds" with particular property (or other property traceable thereto or derived therefrom) for purposes of criminal forfeiture, as the related 18 U.S.C. § 982 requires. Instead, all the money allegedly "laundered" in this case was derived, not from tax fraud, but from the lawful income (that is, the proceeds) of the petitioners' grocery store business, as the indictment concedes.[6]

The term "proceeds" – as used in ordinary discourse – does not even ambiguously include the possible meaning of "profits" unless by "profits" one means "net proceeds," that is, the amount of the "gross receipts" of the criminal activity that remains after all the "ordinary and necessary expenses" (*cf.* 26 U.S.C. § 162) of that activity are paid. The *Santos* plurality's explanation of what is meant by "profits" shows that profits are the funds left over from proceeds, after expenses are paid. *See* 128 S.Ct. at 2026 ("the yield of a crime"); *id.* 2026-27 (referring to paying "costs of a crime," such as renting a getaway car, and distributing shares to confederates, prior to

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[6] A wide variety of other, more dramatic allegations against petitioners had been made during the investigation, according to the Third Circuit's earlier decision, discussing the search warrants in this case. See *United States v. Yusuf*, 461 F.3d 374, 379-81 (3d Cir. 2006).

calculation of "profits"). This is the only way that this Court discussed the concept of "profits." By removing the notion of "proceeds" entirely from the "gross vs. net" debate that this Court tried to resolve in *Santos*, the court below further muddied the waters rather than contributing to their clarification.

The Third Circuit ruled that the portion of lawful receipts of a legitimate business that would otherwise have been remitted to the government, but which are retained on account of a criminal failure to pay taxes, constitute "profits" which can be the subject of a money laundering indictment if fraudulent returns have been mailed to the taxing authorities (since mail fraud, but not tax evasion, is a predicate "unlawful activity" for money laundering). In this holding, the court below either failed to understand, or refused faithfully to implement, this Court's decision in *Santos*. To clarify its meaning for the lower courts, the petition for certiorari in this case should be granted.

2. The circuits are divided on whether the term "proceeds," as used in the federal money laundering statute, includes profits from lawful activity retained by a business as a result of willful nonpayment of taxes, or refers only to profits which are the net proceeds of criminal activity.

Two circuits have decided the question presented in this case, reaching opposite conclusions. In a third, the government confessed error and abandoned

money laundering convictions predicated on tax evasion charged as mail fraud, precisely because such offenses do not generate "proceeds" for purposes of 18 U.S.C. § 1956(a). Not only for the reasons given under Point 1, but also to resolve this direct circuit split, the Court should grant the petition in this case.

The decision below conflicts directly with an Eleventh Circuit decision, which it cites in passing but declines to discuss, *United States v. Khanani*, 502 F.3d 1281, 1295-97 (11th Cir. 2007), aff'g *United States v. Maali*, 358 F.Supp.2d 1154 (M.D.Fla. 2005). *Khanani* involved a fact pattern virtually identical with the one involved here. The defendants, owners of retail clothing stores, implemented a scheme to skim money lawfully earned through store sales, funnel it through various shell entities, and use it to pay cash salaries to undocumented workers. They did not report the income and, as a result of the scheme, enjoyed decreased tax liability and increased profits. The indictment charged them, *inter alia*, with money laundering. The district court entered post-verdicts of acquittal on the money laundering counts, holding that:

> [T]he government's cost savings theory is at odds with the plain and ordinary meaning of 'proceeds'. . . . Having ascertained the plain and ordinary definition of 'proceeds,' it is clear that the term does not contemplate profits or revenue indirectly derived from labor or from failure to remit taxes.

Maali, *supra*, 358 F.Supp.2d at 1160. On appeal by the government, the Eleventh Circuit quoted this passage, holding, "We agree." 502 F.3d at 1296.

The instant petition, like *Khanani*, involves a tax case based on alleged unreported income from lawful business activities. Specifically, the government alleges that petitioners skimmed revenues from United Corporation's legitimate retail grocery supermarket operations and filed false Virgin Islands Gross Receipts tax returns which did not report the skimmed income. According to the indictment theory, every time United Corporation mailed its monthly gross receipts tax return, it committed mail fraud. Further, the government contends that petitioners derived "proceeds" from the mail fraud in the amount of the tax that United Corporation saved by skimming some of its retail grocery revenues and omitting those receipts from the 4% calculation reported on the returns.

Petitioners' case is analytically identical to *Khanani*, but the court below hardly mentioned it. *See* Appx. 9; 536 F.3d at 183 (discussing district court's opinion). Indeed, in what appears to have been the first reported prosecution when the government charged money laundering in the context of falsified tax returns, bootstrapped through a mail fraud theory, the case came up on appeal to the Fifth Circuit and the Department of Justice – in a brief signed by a senior attorney of the Criminal Division, Appellate Section – confessed error:

> The indictment charged . . . that appellants engaged in a scheme to defraud the government of tax revenue by engaging in mail and wire fraud to conceal [one appellant's] income. . . . The initial proceeds deposited into the PMC account came from . . . medical fees and thus were not the proceeds of mail or wire fraud or any other illegal activity. Instead, all the transactions involve money that [appellant] had lawfully earned in his medical practice. * * * [D]efrauding the government of tax revenues does not generate 'proceeds' of specified unlawful activity, and the monetary transactions here did not fall within the ambit of the money laundering statute.

Brief for Appellee (U.S.), *United States v. Smith*, No. 92-1612 (5th Cir., filed Feb. 16, 1993), at 27. As a result of this confession, the court of appeals reversed 138 counts of money laundering and remanded for resentencing. See *United States v. Smith*, 1994 WL 442415, *1 (5th Cir. 1994) (per curiam) (*noted at* 32 F.3d 566) (appeal from resentencing, mentioning prior disposition).

The government's brief in *Smith* relied in part on the report of the Senate Committee on the Judiciary, which had recommended enactment of the money laundering provisions. In discussing the specific, tax-related clause of the Act (which in its present form is § 1956(a)(1)(A)(ii)), the Committee expressly recognized that "tax evasion, unlike other crimes, does not have any clearly identifiable 'proceeds'." To constitute

money laundering, the Committee explained, any associated "tax evasion involved in the transaction [must not be] run-of-the-mill inflation of deductions or the like, but rather the nonreporting of income derived from racketeering, foreign drug operations, or other heinous crimes." *See* "Money Laundering Crimes Act of 1986," S. Rep. No. 99-433, 99th Cong., 2d Sess. 11-12 (1986).

The opinion of the court below is squarely contrary to *Khanani* (and the previously-expressed position of the Department of Justice) and cannot be reconciled with it. As stated in a leading treatise:

> The [Third Circuit decision in this] case is especially disturbing because the court never discussed the fact that tax[crimes] are not a specified unlawful activity. The case contradicts *Khanani* in its conclusion that there are no proceeds of a tax offense and, arguably, permits the government to avoid the statutory omission by simply charging a different predicate crime.

2 Ian M. Comisky, Lawrence S. Feld & Steven M. Harris, *Tax Fraud and Evasion* ¶ 11.02[2][d], at S11-11 (2008 cum. supp. #2). On that basis, the treatise authors describe the decision of the court below as "broad" in sweep and "troubling" in its analysis. *Id.*

The opinion of the court below not only ignores all existing precedent, but also creates a direct conflict in the circuits over the meaning of this important statute. The opinion exposes any taxpayer who

knowingly underreports a tax liability on a mailed or e-filed federal income tax return to potential prosecution for mail fraud, and then in turn for money laundering and accompanying forfeitures in addition to the Title 26 tax charges for such underreporting. By creative prosecutorial argument, improperly endorsed by the court below, the specially defined and narrowly penalized Title 26 offenses are catapulted into Title 18 criminal charges, vastly multiplying their penalties over those designed by Congress.

Relying on bankruptcy fraud cases, and the fact the bankruptcy fraud is a "specified unlawful activity" for money laundering purposes, the court below bolsters its conclusion that funds "retained" as a result of unlawful activity can be treated as proceeds. The property involved in bankruptcy fraud is not "retained" by the perpetrator in the same way that most unpaid taxes are. All of a debtor's property belongs to the estate once the debtor files for bankruptcy, and by concealing an asset from the trustee and the court the debtor is embezzling it from the bankruptcy estate. Courts have characterized such assets as "proceeds" of bankruptcy fraud under 18 U.S.C. § 1956(c)(7)(D) for purposes of money laundering, because the wrongdoers concealed or disguised the assets from the trustee in bankruptcy in order to make them once again their own.

Not one case cited by the court below conflicts with the rationale of *Khanani*. In each cited case, the "proceeds" consisted of a specific asset – bonds, stores, checks – that the defendant concealed from the

bankruptcy estate to make his own. See, *e.g.*, *United States v. Brennan*, 326 F.3d 176 (3d Cir. 2003); *United States v. Ladum*, 141 F.3d 1328 (9th Cir. 1998); *United States v. Levine*, 970 F.2d 681 (10th Cir. 1992). Here, there are simply no specific assets identified as "tax savings" requiring concealment (whether "retained" or "obtained").

The other tax case discussed by the court below is like the bankruptcy cases; it would not justify the unprecedented conclusion reached in this case. In *United States v. Morelli*, 169 F.3d 798 (3d Cir. 1999), the "unpaid taxes" were not "tax savings" as in the present case. *Morelli* is not about someone underreporting and underpaying on an individual or corporate tax return; rather, it is about defendants *embezzling* gasoline excise tax money they *collected* from retail fuel customers that they were supposed to pay over to the government. The *Morelli* defendants actively concealed the funds collected so as not to pay them over. Thus, *Morelli* involved a scheme to conceal and to launder actual funds taken from customers under false pretenses, and which were, upon collection, held in trust for the government. In contrast, the instant case does not involve a tax paid at the source and held in trust, like excise taxes, employment taxes or some sales taxes. In the instant case, there exist no such funds or assets that could have been concealed or laundered.

Nothing in the legislative history of the money laundering statutes (nor anything in Justice Alito's elaboration of that history in the *Santos* dissenting

opinion) suggests that mail fraud – much less the sort of attenuated "mail fraud" involving the filing of understated tax returns involved here – would be an offense meeting Justice Stevens' criteria for distinguishing the plurality's holding in *Santos* – crimes whose gross receipts Congress may specifically have understood as criminal "proceeds." To the contrary, as quoted above, the legislative history specifically *excludes* tax offenses from the category of crimes which can generate the funds which are the subject of a valid money laundering charge. S. Rep. No. 99-433, *supra*, at 11 ("tax evasion, unlike other crimes, does not have any clearly identifiable 'proceeds'"). The "fraud" alleged in this case to constitute the underlying "specified unlawful activity" simply did not generate any "proceeds" on *either* the plurality's *or* the dissenters' understanding of the statutory language.

The court below cited this Court's decision in *Pasquantino v. United States*, 544 U.S. 349 (2005), to support its conclusion (Appx. 25; 536 F.3d at 190), but that case lends it no support. In *Pasquantino*, the defendants were convicted of wire fraud, but money laundering was not charged. The Court held that the "entitlement to collect money from the petitioners," was a property right of the Government of Canada. 544 U.S. at 355-56. The Court did not suggest that the unpaid tax underlying that property right also constituted "proceeds" to the defendants under the money laundering statute. The taxing authority's intangible entitlement to tax revenues – unlike the bonds in *Brennan*, the stores in *Ladum*, the checks in

Levine, or the collected excise taxes in *Morelli* – is "property" of which the government was defrauded. But an "entitlement" of which the victim has been deprived does not necessarily equate to "proceeds" that can be concealed, disguised or laundered. Thus, the decision in *Pasquantino* is in no way challenged by pointing out that the present case illustrates several of the dangers against which the dissenters in that case warned: federal prosecutors extending their use of the mail fraud law to reach into local governmental issues, and multiplying of penalties by triggering money laundering, racketeering and forfeiture claims which are not authorized in a tax case prosecuted as such.

The writ should be granted both to resolve the conflict in the circuits and to enforce this Court's effort to restrict the term "proceeds" in the money laundering statute to its legislatively intended scope.

CONCLUSION

For the foregoing reasons, petitioners pray that this Court grant their petition for a writ of certiorari, and reverse the judgment of the United States Court of Appeals for the Third Circuit, reinstating the order dismissing the money laundering counts from their indictment.

Respectfully submitted,

THOMAS ALKON
RANDALL P. ANDREOZZI
PETER GOLDBERGER
Counsel of Record
GORDON C. RHEA

Attorneys for Petitioners

January 30, 2009

536 F.3d 178

United States Court of Appeals, Third Circuit.

UNITED STATES of America; Government of the Virgin Islands, Appellant

v.

Fathi Yusuf Mohammed YUSUF a/k/a Fathi Yusuf; Waleed Mohammed Hamed a/k/a Wally Hamed; Waheed Mohammed Hamed a/k/a Willie Yusuf; Maher Fathi Yusuf a/k/a Mike Yusuf; Isam Mohamad Yousuf a/k/a Sam Yousef; United Corporation, d/b/a Plaza Extra; Nejeh Fathi Yusuf.

No. 07-3308.

Argued Dec. 11, 2007.
Opinion Filed: June 17, 2008.
As Amended July 21, 2008.

Richard T. Morrison, Esquire, Acting Assistant Attorney General, S. Robert Lyons, Esquire (Argued), Anthony J. Jenkins, Esquire, Alan Hechtkopf, Esquire, United States Attorney, United States Department of Justice, Tax Division, Washington, DC, for Appellant.

Gordon C. Rhea, Esquire (Argued), Richardson, Patrick, Westbrook & Brickman, LLC, Mt. Pleasant, SC, Randall P. Andreozzi, Esquire, Marcus, Andreozzi, Fickess, LLP, Williamsville, NY, Pamela L. Colon, Esquire, John K. Dema, Esquire, Thomas Alkon, Alkon & Meaney, Christiansted, St. Croix USVI, Derek M. Hodge, Esquire, MacKay & Hodge, Charlotte Amalie, St. Thomas, USVI, Henry C. Smock, Esquire, Smock Law Offices, Charlotte Amalie, St. Thomas, USVI, for Appellee.

Before: SMITH, NYGAARD and ROTH, Circuit Judges.

OPINION

ROTH, Circuit Judge:

The government has appealed the District Court's pretrial order, dismissing from the indictment various counts and allegations based on international money laundering.[1] The narrow issue on appeal is whether unpaid taxes, which were unlawfully disguised and retained by means of the filing of false tax returns through the U.S. mail, are "proceeds" of mail fraud for purposes of sufficiently stating a money laundering offense under the federal, international money laundering statute, 18 U.S.C. § 1956(a)(2). We hold that such unpaid taxes are "proceeds" of mail fraud for purposes of sufficiently stating an international money laundering offense. For this reason, we will vacate the orders of the District Court and remand the case for further proceedings consistent with this opinion.

I. *Background*

Because we have previously outlined the facts of this case in *United States v. Yusuf*, 461 F.3d 374 (3d

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[1] The government also appeals from the District Court's order to release notices of *lis pendens* with respect to various properties listed in the indictment.

Cir.2006) and *United States v. Yusuf,* 199 Fed.Appx. 127 (3d Cir.2006), we recite only those facts pertinent to our analysis in this particular appeal.

There are seven defendants in this case: (1) United Corporation, a family-owned business located in the Virgin Islands that operates a chain of three Plaza Extra Supermarket stores in St. Thomas and St. Croix; (2) Fathi Yusuf, the primary shareholder of United; (3) Maher "Mike" Yusuf, Fathi's son, who is a part-owner of United and manager of one of the Plaza Extra stores; (4) Waheed "Willie" Hamed, Fathi's nephew, who manages the second Plaza Extra store; (5) Waleed "Wally" Hamed, Fathi's nephew and Waheed's brother, who manages the third Plaza Extra store; (6) Isam "Sam" Yousef, Fathi's nephew, who is a resident of St. Maarten, Netherlands Antilles, and owns and operates a retail furniture and appliances store; and (7) Nejeh Fathi Yusuf, Fathi's son, who is an owner and employee of United and who participated in the operation of the Plaza Extra stores.

Because defendant United conducts business through its Virgin Islands supermarkets, it is required to comply with statutorily-mandated monthly reporting of gross receipts and payment of tax on those receipts. Section 43(a), Title 33, of the Virgin Islands Code provides, in pertinent part, that "[e]very individual and every firm, corporation, and other association doing business in the Virgin Islands shall *report their gross receipts* and *pay a tax of four percent (4%) on the gross receipts* of such business." 33 V.I.C. § 43(a) (emphasis added). Section 44(c) provides for

monthly returns and payments and states that "[t]he returns and payments required by this subsection shall be due within 30 calendar days following the last day of the calendar month concerned." 33 V.I.C. § 44(c). Thus, taxes imposed on United's gross sales receipts from its supermarkets during a particular month were due and payable on the last day of the following month.

In July 2001, the Federal Bureau of Investigation (FBI) received a suspicious activity report from the Bank of Nova Scotia in St. Thomas, U.S. Virgin Islands. The report stated that, over a four day period in April 2001, $1,920,000 (in $50 and $100 bills) was deposited into United's bank account. The FBI began an investigation which revealed that defendants allegedly conspired to avoid reporting $60,000,000 of the supermarkets' gross receipts on United's Virgin Islands gross receipts monthly tax returns and failed to pay the Virgin Islands government the 4% tax that United owed on those unreported gross receipts.[2] The

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[2] Specifically, after Plaza Extra Supermarkets' sales receipts were collected each day, the funds were typically transferred to the "cash room," to which only certain individuals, including defendants, were permitted access. In the cash room, Plaza Extra employees counted the sales receipts and prepared bank deposit slips. The indictment alleged that defendants directed the employees to withhold from deposit substantial amounts of cash received from sales, typically in denominations of $100, $50, and $20. Instead of being deposited into the bank accounts with other sales receipts, this cash was allegedly delivered to one of the defendants or placed in a designated safe in the cash room. The indictment further alleged that, from 1996

(Continued on following page)

investigation further revealed that defendants allegedly engaged in various efforts to disguise and conceal the illegal scheme and its proceeds.[3] Such efforts included allegedly depositing these monies into bank accounts, controlled by defendants, outside of the United States.

On September 9, 2004, a grand jury in the Virgin Islands returned a seventy-eight count, superseding[4] indictment, charging various counts relating to mail fraud, tax evasion, and international money laundering.[5] At Counts 3 through 43, the indictment charged

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through 2001, tens of millions of dollars in cash was withheld from deposit in this manner and was not reported as gross receipts on both Virgin Islands and federal tax returns filed by United.

[3] For example, with the unreported cash, defendants allegedly purchased, and directed other individuals to purchase, cashier's checks, traveler's checks, and money orders, typically from different bank branches and made payable to outside parties, in order to disguise the cash as legitimate financial instruments and to evade federal record-keeping mandates.

[4] The grand jury handed down the original indictment in this case on September 18, 2003.

[5] The charges included conspiracy to commit mail fraud and structure financial transactions, in violation of 18 U.S.C. § 371 (Count 1); conspiracy to commit money laundering, in violation of 18 U.S.C. § 1956(h), (a)(2)(B)(i) (Count 2); mail fraud, in violation of 18 U.S.C. § 1341 (Counts 3-43); international money laundering, in violation of 18 U.S.C. § 1956(a)(2)(B)(I) [sic] (Counts 44-52); structuring financial transactions, in violation of 31 U.S.C. § 5324(a)(3), (d)(2) (Counts 53, 54, 77); conspiracy to evade taxes, in violation of 33 V.I.C. § 1522 (Count 55); causing the filing of false tax returns, in violation of 33 V.I.C. § 1525(2) (Counts 56-60); causing the filing of false tax returns, in

(Continued on following page)

forty mail fraud offenses, in violation of 18 U.S.C. § 1341, alleging in paragraphs 30 and 31 as follows:

> Beginning at least as early as in or about January 1996 and continuing through at least in or about September 2002, in the District of the Virgin Islands and elsewhere, [defendants] knowingly and willfully devised and intended to devise a scheme and artifice to defraud and to obtain money and property, specifically money belonging to the Virgin Islands in the form of territorial gross receipts tax revenue, by means of material false and fraudulent pretenses, representations and promises, knowing that the pretenses, representations and promises were false when made, as more particularly described in paragraphs 9 through 12 and 14 through 20[6] of this Indictment.

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violation of § 26 U.S.C. § 7206(2) (Counts 61-74); engaging in criminal enterprise, in violation of 14 V.I.C. § 605(a) (Count 75); conspiracy to engage in a criminal enterprise, in violation of 14 V.I.C. § 605(d) (Count 76); and obstruction of justice, in violation of 18 U.S.C. § 1503. The indictment further contained an asset forfeiture allegation, pursuant to 18 U.S.C. § 982, 21 U.S.C. § 853, and 14 V.I.C. § 606.

[6] Paragraphs 9 through 12 alleged that defendants "defrauded the Virgin Islands of money in the form of tax revenue, specifically territorial gross receipts taxes [owed by United] as well as corporate income taxes [owed by United], by failing to report at least $60 million in Plaza Extra sales on gross receipts tax returns and corporate income tax returns" filed by United. Paragraphs 14 through 20 alleged that defendants concealed the fraud and its proceeds by smuggling checks and currency and by structuring cash transactions to evade reporting requirements.

> On or about the dates specified in each count below, the defendants, for the purpose of executing and attempting to execute and in furtherance of the aforesaid scheme and artifice to defraud and for obtaining money and property by means of material false and fraudulent pretenses, representations and promises, did knowingly cause to be sent and moved by the United States Postal Service, at the East End United States Post Office in St. Thomas, Gross Receipts Monthly Tax Returns, Forms 720 V.I., addressed to the Virgin Islands Bureau of Internal Revenue, St. Thomas, Virgin Islands, 00802.

At Counts 44-52, the indictment charged nine substantive international money laundering offenses, in violation of 18 U.S.C. § 1956(a)(2)(B)(i), alleging in paragraph 33 as follows:

> On or about the dates listed in each count below, in the District of the Virgin Islands and elsewhere, the [defendants] transported and transferred, and attempted to transport and transfer, monetary instruments and funds in amounts described below from a place in the United States, specifically the United States Virgin Islands, to and through a place outside the United States, specifically, Amman, Jordan, knowing that the monetary instruments and funds involved in the transportation and transfer represented the proceeds of some form of unlawful activity and knowing that such transportation and transfer was designed in whole or in part to conceal and disguise the

> nature, location, source, ownership, and control of the proceeds of a specified unlawful activity, that is, mail fraud, in violation of Title 18, United States Code Section 1341.

Thus, the indictment relied on mail fraud as the predicate offense, or "specified unlawful activity," to support the money laundering charges against defendants. *See* 18 U.S.C. § 1956(a)(2)(B)(i).

Defendants moved to dismiss the substantive money laundering charges on the basis that any unpaid taxes disguised and retained as a result of filing false tax returns through the U.S. mail do not equate to "proceeds" of mail fraud and, accordingly, Counts 44 through 52, charging money laundering, failed to state an offense. On February 13, 2007, the District Court granted the motion and dismissed the nine substantive money laundering counts for failure to state an offense. For the same reason, the District Court also dismissed the charge of money laundering conspiracy (Count 2); struck from two structuring counts the sentence-enhancing allegations grounded upon money laundering (Counts 53 and 54); and dismissed paragraphs of Criminal Forfeiture Allegation 1, which were grounded upon money laundering. The District Court reasoned as follows:

> Defendants contend that a tax savings resulting from filing false tax returns does not "represent the proceeds of some form of unlawful activity," and that, therefore, Counts 44 through 52 fail to state an offense. In the Third Circuit, "'proceeds' as that term is

used in § 1956 means simply gross receipts from illegal activity.'" *United States v. Grasso*, 381 F.3d 160, 169 (3d Cir.2004) [*overruled by United States v. Santos*, ___ U.S. ___, 128 S.Ct. 2020, 170 L.Ed.2d 912 (2008)]. "'[P]roceeds' are something which is obtained in exchange for the sale of something else as in, most typically, when one sells a good in exchange for money." *United States v. Maali*, 358 F.Supp.2d 1154, 1158 (M.D.Fla.2005)[,] [*aff'd sub nom. United States v. Khanani*, 502 F.3d 1281 (11th Cir.2007)]. The Court agrees with the final analysis in Maali [sic], that "[h]aving ascertained the plain and ordinary definition of 'proceeds,' it is clear that the term does not contemplate profits or revenue indirectly derived . . . from the failure to remit taxes." *Id.* at 1160. The cost savings theory was also rejected in *Anderson v. Smithfield Foods, Inc.*, 209 F.Supp.2d 1270, 1275 (M.D.Fla.2002):

> The money that Defendants allegedly illegally obtained to violate RICO and environmental laws, and to allegedly commit mail and wire fraud, was money that Defendants legally obtained through the operation of its business. Saving money as a result of the alleged noncompliance with the requirements of an environmental statute does not make the money illegally obtained for the purposes of the money laundering statute.

The mailing of the allegedly false gross tax returns did not result in proceeds, as that

> term is commonly interpreted. Accordingly, [the counts charging money laundering] are dismissed for failure to state an offense.

Accordingly, in the District Court's view, the *tax savings* (*i.e.*, unpaid taxes) cannot be considered "proceeds" of mail fraud because such *tax savings* (1) represented a percentage of unreported gross receipts that were *lawfully obtained* in the day to day business of Plaza Extra Supermarket, and, thus, such tax savings cannot thereafter be categorized as "proceeds" from an unlawful activity; and (2) were merely *retained,* rather than *obtained,* money resulting from defendants' noncompliance with the Virgin Islands' gross receipts reporting statute.

On June 25, 2007, the District Court denied the government's motion for reconsideration and ordered the government to release its notices of *lis pendens* with respect to various properties listed in the indictment. The government appealed the February 13 order dismissing the substantive money laundering counts (and paragraphs) and the two June 25 orders denying reconsideration and ordering release of the notices of *lis pendens.*

II. *Jurisdiction and Standard of Review*

The District Court had subject matter jurisdiction pursuant to 18 U.S.C. § 3231 and 48 U.S.C. § 1612(c). We have jurisdiction under 18 U.S.C. § 3731 and 28 U.S.C. § 1294(3).

The "sufficiency of an indictment to charge an offense is a legal question subject to plenary review." *United States v. Conley,* 37 F.3d 970, 975 n. 9 (3d Cir.1994). "An indictment is generally deemed sufficient if it: (1) contains the elements of the offense intended to be charged, (2) sufficiently apprises the defendant of what he must be prepared to meet, and (3) allows the defendant to show with accuracy to what extent he may plead a former acquittal or conviction in the event of a subsequent prosecution." *United States v. Rankin,* 870 F.2d 109, 112 (3d Cir.1989) (internal quotation marks and citations omitted). An indictment does not state an offense sufficiently if the specific facts that it alleges "fall beyond the scope of the relevant criminal statute, as a matter of statutory interpretation." *United States v. Panarella,* 277 F.3d 678, 685 (3d Cir.2002).

III. *Discussion*

There is no dispute that the indictment sufficiently alleges mail fraud, pursuant to 18 U.S.C. § 1341. There is also no dispute that mail fraud is a predicate offense for a charge of international money laundering, pursuant to 18 U.S.C. §§ 1956(a)(2)(B)(i) (elements of international money laundering)[7], 1956(c)(7)(A)

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[7] The federal money laundering statute, 18 U.S.C. § 1956(a)(2), provides:

> Whoever transports, transmits, or transfers, or attempts to transport, transmit, or transfer a monetary instrument or funds from a place in the United States

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(the term "specified unlawful activity" includes any racketeering activity under RICO) and 1961(1)(B) (mail fraud is a racketeering activity)[8]. The narrow issue in this appeal is whether unpaid taxes unlawfully disguised and retained by means of the filing of false tax returns through the U.S. mail are "proceeds" of mail fraud for purposes of sufficiently stating an offense for money laundering.

As a threshold matter, we first address the District Court's view that funds originally procured through lawful activity can be classified only as proceeds of that lawful activity and cannot thereafter

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> to or through a place outside the United States or to a place in the United States from or through a place outside the United States . . .
>
> > (B) knowing that the monetary instrument or funds involved in the transportation, transmission, or transfer represent the *proceeds of some form of unlawful activity* and knowing that such transportation, transmission, or transfer is designed in whole or in part –
> >
> > > (i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the *proceeds of specified unlawful activity*; . . .
>
> shall be sentenced to a fine of not more than $500,000 or twice the value of the monetary instrument or funds involved in the transportation, transmission, or transfer whichever is greater, or imprisonment for not more than twenty years, or both.

18 U.S.C. § 1956(a)(2)(B)(i) (emphasis added).

[8] Under 18 U.S.C. § 1961(1), mail fraud is a "specified unlawful activity," but tax fraud simpliciter is not.

be converted into proceeds of a specified unlawful activity.

Although the federal money laundering statute does not define what constitutes "proceeds" of a specified unlawful activity, *see United States v. Santos*, ___ U.S. ___, 128 S.Ct. 2020, 2024, 170 L.Ed.2d 912 (2008), it specifically identifies which criminal offenses constitute "specified unlawful activities." 18 U.S.C. § 1956(c)(7). The term "specified unlawful activity" covers a broad array of offenses.[9] For example, the fraudulent *concealment* of a bankruptcy estate's assets is categorized as a "specified unlawful activity." *See* 18 U.S.C. §§ 1956(c)(7)(A), 152(1) (criminalizing the concealment of assets relating to § 152). Thus, property which is required to be included in a bankruptcy debtor's estate but is instead undeclared, and thus *retained,* is "proceeds" of a bankruptcy fraud offense under 18 U.S.C. § 152(1). *United States v. Brennan,* 326 F.3d 176, 190 (3d Cir.2003) (the defendant, debtor-in-possession, transferred bonds belonging to the bankruptcy estate to a third person who cased the bonds and invested the proceeds for the defendant's benefit). Moreover, simply because funds are *originally* procured through *lawful* activity does

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[9] That term is defined, in pertinent part, by reference to those criminal activities that constitute racketeering under RICO. 18 U.S.C. § 1956(c)(7)(A) ("[T]he term 'specified unlawful activity' means any act or activity constituting an offense listed in section 1961(1) of this title. . . ."). As previously noted, mail fraud is categorized as a racketeering act and thus falls within the purview of the money laundering statute.

not mean that one cannot thereafter convert those same funds into the "proceeds" of an unlawful activity. *See United States v. Ladum,* 141 F.3d 1328, 1340 (9th Cir.1998) (sustaining money laundering conviction where the defendant concealed rental income derived from lawfully operated retail stores); *United States v. Levine,* 970 F.2d 681, 686 (10th Cir.1992) (sustaining money laundering conviction where the defendant concealed corporate tax refund checks deposited in a hidden bank account). Accordingly, we reject the suggestion that to qualify as "proceeds" under the federal money laundering statute, funds must have been *directly* produced by or through a specified unlawful activity, and we agree that funds *retained* as a result of the unlawful activity can be treated as the "proceeds" of such crime.

Furthermore, the Supreme Court, in *United States v. Santos,* recently clarified that the term "proceeds," as that term is used in the federal money laundering statute, applies to criminal profits, not criminal receipts, derived from a specified unlawful activity. ___ U.S. ___, 128 S.Ct. 2020, 2025, 170 L.Ed.2d 912 (applying the rule of lenity to interpret the ambiguous term "proceeds" to mean "profits" of a criminal activity rather than "receipts"). In *Santos,* the defendants were convicted of violating 18 U.S.C. § 1956(a)(1)(A)(i) – the subsection of the federal money laundering statute that criminalizes financial transactions using the proceeds of a specified unlawful activity with the intent to promote the carrying on of such activity. The Supreme Court affirmed the trial

court's decision to vacate the money laundering convictions because the transactions on which such convictions were based involved the gross receipts, as opposed to the profits, of the specified unlawful activity – the operation of an illegal lottery.[10] The Supreme Court reasoned that the transactions upon which the money laundering charges were based could not be considered to have involved "proceeds" of the illegal lottery's operation because such transactions involved the mere payment of the illegal operation's *expenses* rather than the operation's *profits*.[11]

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[10] In that case, defendant Santos operated an illegal lottery. He employed individuals known as "runners" to collect the gamblers' bets. Upon receipt of the bets, the runners retained a small portion as their commission and handed over the remaining money to individuals known as "collectors," one of whom was defendant Diaz. The collectors would then deliver such money to Santos, who used a portion of it to pay the collectors' salaries and pay the winners. The payments to the runners, collectors, and winners were identified in an indictment as the "transactions" upon which money laundering charges were based under 18 U.S.C. § 1956(a)(1)(A)(i) (criminalizing transactions which promote criminal activity).

[11] The Supreme Court reasoned as follows:

> Transactions that normally occur during the course of running a lottery are not identifiable uses of profits and thus do not violate the money-laundering statute. More generally, a criminal who enters into a transaction paying the expenses of his illegal activity cannot possibly violate the money-laundering statute, because by definition profits consist of what remains after expenses are paid. Defraying an activity's costs with its receipts simply will not be covered.

Santos, ___ U.S. ___, 128 S.Ct. 2020, 2026, 170 L.Ed.2d 912.

Santos, ___ U.S. ___, 128 S.Ct. 2020, 2026, 170 L.Ed.2d 912.[12]

Moreover, we have previously determined that "proceeds are derived from an already completed offense, or a completed phase of an ongoing offense, before they can be laundered." *United States v. Conley*, 37 F.3d 970, 980 (3d Cir.1994).

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[12] In *Santos*, a four-Justice plurality concluded that, in applying the rule of lenity, the word "proceeds" in the money laundering statute means profits and not, as the government had argued, gross receipts. 128 S.Ct. at 2023-25 (plurality opinion). Justice Stevens, the tie-breaker, took the view in his concurring opinion that, depending on the import of legislative history, proceeds may mean profits as applied to some specified unlawful activities and gross receipts as applied to others. 128 S.Ct. at 2031-32 (Stevens, J., *concurring*); *see id.* at 2030 (stating that "Justice STEVENS expresses the view that the rule of lenity applies to this case because there is no legislative history reflecting any legislator's belief about how the money-laundering statute should apply to lottery operators") (*citing id.* at 2032-33). As the plurality recognized, "[s]ince his vote is necessary to our judgement, and since his opinion rests upon the narrower ground, the Court's holding is limited . . . ," to the holding " . . . that 'proceeds' means 'profits' when there is no legislative history to the contrary." 128 S.Ct. at 2031 (*citing Marks v. United States*, 430 U.S. 188, 193, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977)).

In view of the above discussion, we believe that *Santos* overrules this Court's decision in *United States v. Grasso*, which was relied upon by the District Court in the instant case. *Grasso*, 381 F.3d 160, 169 (3d Cir.2004) (holding that " 'proceeds,' as that term is used in the money laundering statute, means gross receipts [from illegal activity] rather than profits").

Having thus elucidated the definition of "proceeds," we will next consider how the term "proceeds" relates to the predicate offense of mail fraud. The mail fraud statute provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service . . . shall be fined under this title or imprisoned not more than 20 years, or both.

18 U.S.C. § 1341. Stated plainly, the elements necessary to establish the offense of mail fraud are (1) a scheme or artifice to defraud for the purpose of obtaining money or property and (2) use of the mails in furtherance of the scheme. Therefore, once these two requirements are met, mail fraud has been committed.

The Supreme Court has previously interpreted the elements of mail fraud. A scheme to defraud need not contemplate the use of mails as an essential part of the scheme so long as the mailing is "incident to an essential part of the scheme." *Schmuck v. United States*, 489 U.S. 705, 710-11, 109 S.Ct. 1443, 103 L.Ed.2d 734 (1989) (*citing Pereira v. United States*, 347 U.S. 1, 8, 74 S.Ct. 358, 98 L.Ed. 435 (1954) *and*

quoting Badders v. United States, 240 U.S. 391, 394, 36 S.Ct. 367, 60 L.Ed. 706 (1916)). Under the mail fraud statute, the mailing must be for the "purpose of executing the scheme."[13] *Kann v. United States,* 323 U.S. 88, 94, 65 S.Ct. 148, 89 L.Ed. 88 (1944). Furthermore, a mailing cannot be said to be in furtherance of a scheme to defraud, nor can a mailing be considered even incident to an essential part of the scheme, when it occurs after the scheme has reached fruition. *Id.* at 94-95, 65 S.Ct. 148.

In *Schmuck,* the defendant was a used-car distributor who purchased used cars, rolled back their odometers and sold the vehicles to retail dealers at prices he was able to inflate by reason of the low-mileage readings. The dealers, unaware of the fraud, resold the automobiles to their customers, who also paid inflated prices. The Supreme Court held that the mailing element was satisfied by the dealers' mailings of title application forms to the state of Wisconsin on behalf of the customers, explaining that "a rational jury could have found that the title-registration mailings were part of the execution of the fraudulent scheme, a scheme which did not reach fruition until

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[13] In *Kann,* the defendants cashed fraudulently obtained checks at various banks, knowing that the checks would be forwarded to a drawee bank for collection. The Supreme Court found that the mailing was not material to the consummation of the scheme and thus concluded that there was no mail fraud. 323 U.S. at 94, 65 S.Ct. 148 ("It cannot be said that the mailings in question were for the purpose of executing the scheme, as the statute requires.").

the retail dealers resold the cars and effected transfers of title." *Schmuck,* 489 U.S. at 712, 109 S.Ct. 1443. Finding that the scheme would have come to an end if the dealers had lost faith in the distributor or were unable to re-sell the cars, the Court concluded that "although the registration-form mailings may not have contributed directly to the duping of either the retail dealers or the customers, they were necessary to the passage of title, which in turn was essential to the perpetuation of Schmuck's scheme." *Id.*

Moreover, in *United States v. Morelli,* we affirmed a district court's judgments of conviction and sentence and concluded that unpaid taxes that were unlawfully disguised and retained constituted "proceeds" of wire fraud for purposes of supporting a conviction on a federal money laundering charge.[14] 169 F.3d 798, 806 (3d Cir.1999) The defendant in

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[14] Wire fraud, like mail fraud, is a racketeering activity and thus a predicate offense for money laundering. *See* 18 U.S.C. §§ 1956(a)(2)(B)(i), (c)(7)(A); *see also* 18 U.S.C. § 1961(1). The federal wire fraud statute, 18 U.S.C. § 1343, is nearly identical to the federal mail fraud statute. *See Morelli,* 169 F.3d at 806 (stating that "[w]ire fraud consists of (1) a scheme to defraud and (2) a use of a wire transmission for the purpose of executing, or attempting to execute, the scheme"); *see also id.* at 806 n. 9 (explaining that the federal wire fraud and mail fraud statutes "differ only in form, not in substance, and cases . . . interpreting one govern the other as well"); *see also United States v. Tarnopol,* 561 F.2d 466, 475 (3d Cir.1977) ("[T]he cases interpreting the mail fraud statute are applicable to the wire fraud statute as well.").

Morelli was involved in a "daisy chain"[15] scheme which included a series of transactions that resulted in the embezzlement of excise taxes from fuel sales. The "daisy chain" scheme operated as follows:

> The particular scheme in which the defendants participated was termed "the Association." The Association organized a group of companies, all of which it controlled, into a "daisy chain," for the purpose of embezzling the excise taxes on the sale of certain kinds of fuel. Typically, the companies would sell oil down the chain in a series of paper transactions, through what was referred to as the "burn company." Eventually, the company at the bottom of the chain, the "street company," would sell the oil to a legitimate retailer, i.e., a particular gas station, for a price slightly below the tax-included market price. This retailer would pay money to the street company, which would send money back up the chain in a series of wire transfers.

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[15] The elements of "daisy chain" schemes have previously been detailed in this circuit and others. *See, e.g., United States v. Sertich*, 95 F.3d 520, 522 (7th Cir.1996), *cert. denied*, 519 U.S. 1113, 117 S.Ct. 952, 136 L.Ed.2d 840 (1997); *United States v. Veksler*, 62 F.3d 544, 547 (3d Cir.1995); *United States v. Macchia*, 35 F.3d 662, 665-66 (2d Cir.1994); *United States v. Victoria-21*, 3 F.3d 571, 573 (2d Cir.1993); *In re Assets of Martin*, 1 F.3d 1351, 1353 (3d Cir.1993); *United States v. Tarricone*, 996 F.2d 1414, 1416-17 (2d Cir.1993); *United States v. Aracri*, 968 F.2d 1512, 1514-17 (2d Cir.1992); *United States v. Musacchia*, 900 F.2d 493, 495-96 (2d Cir.1990), *vacated*, 955 F.2d 3 (2d Cir.1991).

> This scheme was illegal because it was set up as a means to avoid excise taxes. The daisy chain was established so that the burn company was the one legally responsible for collecting the excise taxes on the fuel sales and transmitting them to the government. In the Association's scheme, the burn company would collect the taxes for a time, and then disappear without ever paying the taxes to the government. As a result, the Association could keep the money representing the excise taxes without the government being able to determine where it had gone.

Id. at 803. On appeal, the defendant claimed that the money represented the "proceeds" of tax fraud, not the "proceeds" of a wire fraud, because the wiring itself had nothing to do with the Association's coming into possession of the money. We did not agree.

In affirming the trial court's judgments of conviction and sentence on the money laundering charge, we held that the money wired up through the "daisy chain" constituted "proceeds" of wire fraud based on the nature of the *entire ongoing fraudulent scheme.* 169 F.3d 798, 806-07. We reasoned as follows:

> We think the money was the proceeds of the *entire ongoing fraudulent venture* in which the Association engaged in creating the daisy chain scheme, and that this venture was a wire fraud scheme. This ongoing venture consisted of all the individual series of transactions upon which [the defendant] focuses, not the discrete series of

> transactions individually. *Although each series may have included discrete acts of wire fraud that followed the creation of the proceeds related to that series, the fact is that the entire program, encompassing all of the acts charged in the indictment, constituted one large, ongoing wire fraud scheme. Each wiring in each series furthered the execution of each and every individual act of tax fraud, and helped to create the proceeds involved in each succeeding series of transactions.* This is primarily because each wiring, whether it occurred before or after a given act of tax fraud, served to promote and conceal each individual embezzlement of taxes, either *ex ante* or *ex post*. *More precisely, each wiring, including those that occurred before a particular transaction, made it more difficult for the government to detect the entire fraudulent scheme or any particular fraudulent transaction or series of transactions.* In sum, the money gained in each series of transactions (save the initial one) was the proceeds of wire fraud because the money was the proceeds of a fraud that was furthered by the prior wirings.

Morelli, 169 F.3d at 806-07 (emphasis added); *see also id.* at 808 (*quoting Schmuck*, 489 U.S. at 712, 109 S.Ct. 1443 ("Each wiring 'was essential to the perpetuation of [the Association]'s scheme.")). Finally, we concluded that, under the reasoning in *Schmuck*, each wiring contributed to the entire scheme and made each subsequent individual fraudulent transaction

series more likely to be successful and less likely to be detected. *See Morelli,* 169 F.3d at 807.

Based upon the Supreme Court's decisions in *Santos, Schmuck*, and *Kann,* and our decision in *Morelli,* we hold that unpaid taxes, which are unlawfully disguised and retained by means of the filing of false tax returns through the U.S. mail, constitute "proceeds" of mail fraud for purposes of supporting a charge of federal money laundering. Here, 4% of the unreported gross receipts that should have been paid as tax to the Virgin Islands but were instead included in the lump sums of money which the defendants sent to Amman, Jordan, were clearly "proceeds" of the fraudulent scheme perpetuated by defendants. Specifically, the defendants' fraudulent scheme was that of concealing certain gross receipts from the Virgin Islands government through the mailing of fraudulent tax returns in order to defraud, cheat, and deprive the government of the 4% gross receipts taxes it was owed, thus enabling the defendants to unlawfully retain such government property and profit from their scheme. *See Pasquantino v. United States,* 544 U.S. 349, 355-56, 125 S.Ct. 1766, 161 L.Ed.2d 619 (2005) (holding that Canada's right to uncollected excise taxes on imported liquor is "property" in its hands, depriving Canada of that money inflicts "an economic injury no less than had they embezzled the funds from the Canadian treasury."); *Hammerschmidt v. United States,* 265 U.S. 182, 188, 44 S.Ct. 511, 68 L.Ed. 968 (1924) (explaining that to defraud the United States primarily means "to cheat the

government out of property or money" and to deprive the government of "something of value by trick, deceit, chicane, or overreaching"). Here, the mailings were both for the purpose of executing the scheme and were material to the consummation of the scheme. *See Kann,* 323 U.S. at 94, 65 S.Ct. 148. The use of the mail to file fraudulent tax returns and fail to pay all taxes owed was not only incident to an essential part of the scheme, but also was clearly *an* essential part of the scheme because such mailings were the defendants' way of concealing the scheme itself by making the fraudulently reported gross receipts seem legitimate. *See Schmuck,* 489 U.S. at 711, 109 S.Ct. 1443; *Pereira,* 347 U.S. at 8, 74 S.Ct. 358.

Furthermore, the mailings of the fraudulent tax returns resulted in "proceeds" of mail fraud based on the nature of the *entire ongoing fraudulent scheme* because the unpaid taxes unlawfully retained by defendants represented the "proceeds" of a fraud that was also furthered by previous mailings. *See Morelli,* 169 F.3d at 806-07. Each mailing, whether it occurred before or after a given act of tax fraud, served to promote and conceal each month's unlawful retention of taxes, either *ex ante* or *ex post,* and made it more difficult for the government to detect the entire fraudulent scheme. *See id.* Moreover, each mailing of the fraudulent tax forms "contributed directly to the duping" of the Virgin Islands government, and subsequent mailings were essential to keep defendants' scheme going because it would have come to an end if

the tax collecting authorities did not continue to receive these mailings. *See Schmuck*, 489 U.S. at 712, 109 S.Ct. 1443. Accordingly, it logically follows that the unpaid taxes, unlawfully disguised and retained through the mailing of the tax forms, were "proceeds" of defendants' overall scheme to defraud the government. This scheme was both dependent on and completed by the monthly mailing of the false Virgin Islands gross receipts tax returns.

Finally, in light of the Supreme Court's decision in *Santos*, we recognize that the "proceeds" from the mail fraud in this case also amount to "profits" of mail fraud. *See* ___ U.S. ___, 128 S.Ct. 2020, 2025, 2036, 170 L.Ed.2d 912. By intentionally misrepresenting the total amount of Plaza Extra Supermarkets' gross receipts through the mailing of fraudulent tax returns, the defendants were able to secretly "pocket" the 4% gross receipts taxes on the unreported amounts which were the property of the Virgin Islands government. *Cf.*, *Pasquantino v. United States*, 544 U.S. 349, 125 S.Ct. 1766, 161 L.Ed.2d 619 (2005) (recognizing no material difference between defrauding a government of taxes due and embezzling money from the treasury, the Supreme Court held that unpaid tax constituted property under the wire fraud statute). Other than some small expenses incurred in perpetuating the mail fraud – i.e., the postage stamp affixed to their monthly tax return or any other preparation fees relating to the return – the unpaid taxes retained by defendants amounted to profits. Once these profits were included in the lump

sums sent abroad by defendants, the offense of international money laundering was complete.

IV. *Conclusion*

Based on the foregoing, we will vacate the District Court's February 13, 2007, and June 25, 2007, orders and remand this case for further proceedings in accordance with this opinion.

NOT PRECEDENTIAL – NOT FOR PUBLICATION

IN THE DISTRICT COURT
OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

UNITED STATES OF AMERICA and GOVERNMENT OF THE VIRGIN ISLANDS, Plaintiffs, v. FATHI YUSUF MOHAMMED YUSUF, WALEED MOHAMMED HAMED, WAHEED MOHAMMED HAMED, MAHER FATHI YUSUF, ISAM MOHAMAD YOUSUF, and UNITED CORPORATION, dba Plaza Extra Supermarkets, Defendants.	CRIM NO. 2005-0015

MEMORANDUM OPINION

Finch, J.

THIS MATTER comes before the Court on Defendants' Motion to Strike Counts from the Third Superseding Indictment. Defendants seek dismissal of Counts 1, 22, 55 and 76 as multiplicitous; Counts 3 through 43, 44 through 52, as both failing to state claims under the respectively charged statutes and contrary to the Department of Justice policy; Counts 53, 54, 56 through 74, 75 and 77 and Criminal

Forfeiture Allegations 1 and 2 as failing to state claims under the respectively charged statutes; and the conspiracy counts as insufficiently pled. The Government opposes such motion. A hearing was held on such motion on June 6, 2005.

I. Motion to Dismiss Counts 1, 22, 55, and 76 as Multiplicitous

At this stage in the litigation, whether any counts in the Indictment are multiplicitous is irrelevant. As the Supreme Count stated in *Ohio v. Johnson,* 467 U.S. 493, 500 (1984), "[w]hile the Double Jeopardy Clause may protect a defendant against cumulative punishments for convictions on the same offense, the Clause does not prohibit the State from prosecuting respondent for such multiple offenses in a single prosecution." "The consistent practice in this Circuit to remedy multiplicitous convictions that may implicate the Double Jeopardy clause is to require trial judges to impose a general sentence for all of said convictions." *United States v. Blyden*, 930 F.2d 323, 328 (3d Cir. 1991). Therefore, the Court will not strike Counts 1, 22, 55, or 76 as multiplicitous before trial.

II. Motion to Dismiss Counts 3 through 43 for Failure to State Claims and as Contrary to Department of Justice Policy

Counts 3 through 43 charged forty-one counts of mail fraud in violation of 18 U.S.C. § 1341 against Defendants Fathi Yusuf, Waheed Hamed and Waleed Hamed for mailing allegedly false monthly gross receipt tax returns (Forms 720) to the Virgin Islands Bureau of Internal Revenue. "Under 18 U.S.C. § 1341, a person is guilty of mail fraud if, 'having devised or intending to devise any scheme or artifice to defraud,' and 'for the purpose of executing such scheme or artifice or attempting so to do,' he 'knowingly causes to be delivered by mail or [interstate] carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any . . . matter or thing.'" *United States v. Al-Ame*, 434 F.3d 614, 616 (3d Cir. 2006). Defendants argue that charges must be dismissed because; (1) the use of a mail fraud charge with a tax violation is improper and contrary to Congressional intent; (2) routine mailings required by law which take place during the course of a fraudulent scheme are not sufficiently related to the scheme to support a mail fraud prosecution; and (3) under United States Department of Justice policy, cases based on the submission of false or fraudulent returns should be brought under the applicable Internal Revenue Code provisions.

That the submission of false tax returns is specifically covered by 26 U.S.C. § 7206 and in the Virgin

Islands by 14 V.I.C. § 1525 does not preclude prosecution under 18 U.S.C. § 1341. "[T]he tax code is not the exclusive regime under which tax fraud schemes may be prosecuted." *United States v. Dale*, 991 F.2d 819, 849 (D.C. Cir. 1993). For example in *United States v. Miller*, 545 F.2d 1204, 1216 (9th Cir. 1976), both mail fraud and tax fraud convictions were upheld against a defendant who signed false tax returns and submitted them to the IRS through the mails.

Defendants rely on *United States v. Henderson*, 386 F. Supp. 1048, 1052-53 (S.D.N.Y. 1974) for the proposition that schemes aiding [sic] at defrauding the government of taxes do not fall within the scope of the mail and wire fraud statutes. Like the court in *Miller*, 545 F.2d at 1216 n.17, this Court rejects the holding in *Henderson*. *See also United States v. Fountain*, 357 F.3d 250, 258 (2d Cir. 2004) (noting that *Henderson* is the only court to have held that tax fraud crimes against the government cannot be constituted under the mail fraud statute and that it has been rejected).

"'[T]he use of the mails need not be an essential element of the scheme' in order to constitute mail fraud; rather, it is 'sufficient for the mailing to be incident to an essential part of the scheme or a step in [the] plot.'" *Al-Ame*, 434 F.3d at 616 (quoting *Schmuck v. United States*, 489 U.S. 705, 710-11 (1989)). "[T]he Supreme Court has definitively rejected the assertion that routine or innocent mailings are *per se* excluded from the scope of 18 U.S.C. § 1341." *Id.* at 617 (citing *Schmuck*, 489 U.S. at 714-15). The

mailings in this case, though in compliance with internal revenue procedure, were not a direct product of any legal duty, but were derivative of Defendants' alleged scheme to obtain money and property belonging to the Virgin Islands in the form of territorial gross receipts tax revenue. *See Schmuch* [sic], 489 U.S. at 713 (distinguishing *Parr v. United States*, 363 U.S. 370, 387, 391 (1960)). Thus, the mailings are sufficiently related to the alleged scheme to support a mail fraud prosecution.

Finally, as to Defendants' argument that the decision to charge Defendants with mail fraud constitutes an abuse of prosecutorial discretion, the Court relies "on the basic precept that a prosecutor's charging decision is presumptively lawful and that courts must be cautious not to intrude unduly in the broad discretion given to prosecutors in making charging decisions. That the Department of Justice has developed an internal protocol for exercising discretion and channeling prosecutorial resources does not provide license for courts to police compliance with that protocol, and it is well established that . . . internal prosecutorial protocols do not vest defendants with any personal rights." *United States v. Jackson*, 327 F.3d 273, 295 (4th Cir. 2003) (citation and quotations omitted); *see also United States v. Batchelder*, 442 U.S. 114, 124 (1979) ("Whether to prosecute and what charge to file or bring before a grand jury are decisions that generally rest in the prosecutor's discretion."). A nonconformance with the Department of Justice policy or protocol regarding the decision to

charge Defendants with mail fraud would not license the Court to strike the mail fraud counts.

III. Motion to Dismiss Counts 44 through 52 as Failing to State a Claim and as Contrary to Department of Justice Policy

Counts 44 through 52 charge four counts of money laundering in violation of 18 U.S.C. § 1956(a)(2)(B)(i) against Fathi Yusuf and five counts of money laundering against Waleed Hamed. Count 2 alleges a money laundering conspiracy for conspiring to violate 1956(a)(2)(B)(i). Section 1956(a)(2)(B)(i) provides:

> Whoever transports, transmits, or transfers, or attempts to transport, transmit, or transfer a monetary instrument or funds from a place in the United States to or through a place outside the United States or to a place in the United States from or through a place outside the United States . . . (B) knowing that the monetary instrument or funds involved in the transportation, transmission, or transfer represent the proceeds of some form of unlawful activity and knowing that such transportation, transmission, or transfer is designed in whole or in part – (i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; . . . shall be sentenced to a fine of not more than $500,000 or twice the value of the monetary instrument or funds involved in the transportation, transmission, or transfer

> whichever is greater, or imprisonment for not more than twenty years, or both.

The Third Superseding Indictment further specifies that the "specified unlawful activity" is mail fraud in violation of 18 U.S.C. § 1341. Fathi Yusuf and Waleed Hamed allegedly engaged in tax evasion by sending false monthly gross tax returns through the postal service to the Bureau of Internal Revenue. The Court assumes that this is the mail fraud to which the Third Superseding Indictment refers.

Defendants contend that a tax savings resulting from filing false tax returns does not "represent the proceeds of some form of unlawful activity," and that, therefore, Counts 44 through 52 fail to state an offense. In the Third Circuit, "'proceeds' as that term is used in § 1956 means simply gross receipts from illegal activity.'" *United States v. Grasso*, 381 F.3d 160, 169 (3d Cir. 2004). "'[P]roceeds' are something which is obtained in exchange for the sale of something else as in, most typically, when one sells a good in exchange for money." *United States v. Maali*, 358 F. Supp.2d 1154, 1158 (M.D. Fla. 2005). The Court agrees with the final analysis in *Maali*, that "[h]aving ascertained the plain and ordinary definition of 'proceeds,' it is clear that the term does not contemplate profits or revenue indirectly derived . . . from the failure to remit taxes." *Id.* at 1160. The cost savings theory was also rejected in *Anderson v. Smithfield Foods Inc.*, 290 F. Supp.2d 1270, 1275 (M.D. Fla. 2002):

> The money that Defendants allegedly illegally obtained to violate RICO and environmental laws, and to allegedly commit mail and wire fraud, was money that Defendants legally obtained through the operation of its business. Saving money as a result of the alleged noncompliance with the requirements of an environmental statute does not make the money illegally obtained for the purposes of the money laundering statute.

The mailing of the allegedly false gross tax returns did not result in proceeds, as that term is commonly interpreted. Accordingly, Counts 44 through 52 are dismissed for failure to state an offense. Count 2, charging a money laundering conspiracy, is dismissed for the same reasons.

IV. Motion to Dismiss Counts 56 through 76 for Failure to State Claims under 26 U.S.C. § 7206(2)

Counts 61 through 65, 66 through 70, and 71 through 74 charge Defendants Fathi Yusuf, Waleed Hamed and Waheed Hamed, respectively, with aiding and assisting in filing their own false income tax returns in violation of 26 U.S.C. § 7206(2). Defendants contend that aiding and assisting in the filing of their own false income tax returns does not violate 26 U.S.C. § 7206(2).

Title 26 U.S.C. § 7206(2) provides:

> Any person who . . . [w]illfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document; . . . shall be guilty of a felony.

A taxpayer who prepares his own false tax return without aiding or assisting another such as a tax preparer, accountant, or attorney, cannot be found to have violated this statute, because of course, a person cannot aid or assist himself. However, once the taxpayer provides false information to another, such as a tax preparer, accountant, or attorney, to aid or assist the other in preparing the taxpayer's own false tax return, the taxpayer is aiding or assisting in the presentation of a false tax return, notwithstanding the lack of knowledge of the other and notwithstanding that the false information is supplied for the purpose of inclusion in his own tax return. *See United States v. Greger*, 716 F.2d 1275, 1277 (9th Cir. 1983); *see also Baker v. United States*, 401 F.2d 958 (D.C. Cir. 1968) (taxpayer prosecuted under s [sic] 7206(2) for assisting another to falsify his own tax return). Therefore, Counts 61 through 74 are not subject to dismissal on this ground.

Defendants also argue that because they filed their tax returns with the Virgin Islands Bureau of Internal Revenue, rather than the Internal Revenue Service, they could not have violated 26 U.S.C. § 7206(2). Section 7206(2) applies to the presentation of a document "under, or in connection with any matter arising under, the internal revenue laws." Title 26 U.S.C. § 932(c)(2) specifically requires that residents of the Virgin Islands file income tax returns with the Virgin Islands Bureau of Internal Revenue. Therefore, Defendants' tax returns constitute a document presented in connection with a matter arising under the internal revenue laws.

Finally, Defendants consider Counts 56 through 74 to be vague. A defendant is entitled to an indictment that states all of the elements of the offense charged, informs him of the nature of the charge so that he may prepare a defense, and protects him from double jeopardy by enabling him to plead the judgment as a bar to any later prosecution for the same offense. *Russell v. United States*, 369 U.S. 749, 763-764 (1962). "The essential elements of an offense under section 7206(2) are (1) that defendant aided, assisted, procured, counseled, advised or caused the preparation and presentation of a return; (2) that the return was fraudulent or false as to a material matter; and (3) that the act of the defendant was willful." *United States v. Gambone*, 314 F.3d 163, 174 (3d Cir. 2003). Title 33 V.I.C. § 1525(2), charged in counts 56 through 60, is identical to 26 U.S.C. § 7206(2) and shares the same essential elements.

Counts 56 through 74 plead these essential elements. All of these counts allege that the respective Defendants filed returns which they did not believe to be true. The counts specify the amount of income reported by the Defendants for each of the years in question and allege that the Defendants' income for each of those years exceeded the amount reported. These allegations are sufficiently definite to overcome a vagueness challenge. *See United States v. McDonnell*, 696 F. Supp. 356, 361 (N.D. Ill. 1988).

In *McDonnell*, the defendant similarly argued that the counts were deficient because they did not specify the total amount of income that the Government theorized that the defendant should have reported. *Id.* The court held: "Such evidentiary detail, however, is not required." *Id.* The court further recognized that the Government's summaries, charts and financial analyses that would be produced pretrial, "coupled with the information contained in the indictment, sufficiently apprises the defendant of the charges against him in the tax counts so that he may adequately prepare a defense." *Id.* As in *McDonnell*, the Government will be producing its final summary schedule pretrial so that Defendants may adequately prepare their defenses. *See* Order dated May 27, 2005, Docket No. 491.

Counts 56 through 74 are not so vague as to render Defendants unable to protect themselves from subsequent prosecutions for the same offense, "particularly when it is remembered that they could rely upon other parts of the present record in the event

that future proceedings should be taken against them." *Russell*, 369 U.S. at 764. The counts as well as the trial record will clearly indicate the tax years and returns involved. There is little danger that Defendants will be prosecuted again for the same violations. *See United States v. Harrold*, 796 F.2d 1275, 1278 (10th Cir. 1986).

V. Motion to Dismiss Count 75 for Failure to State a Claim, under 14 V.I.C. § 605(a) and as Otherwise Contrary to Department of Justice Policy.

Count 75 charges Defendants Fathi Yusuf, Waheed Hamed, Waleed Hamed and United with violating 14 V.I.C. § 605(a), the Criminally Influenced and Corrupt Organization statute (CICO), which makes it "unlawful for any person employed by, or associated with, any enterprise, as that term is defined herein, to conduct or participate in, directly or indirectly, the affairs of the enterprise through a pattern of criminal activity." "'Criminal activity'" means engaging in . . . offenses, violations or the prohibited conduct as variously described in the laws governing this jurisdiction including any Federal criminal law, the violation of which is a felony and, in addition, those crimes, offenses, violations or prohibited conduct as found in the Virgin Islands Code as follows: . . . (37) Title 33, chapter 45, Virgin Islands Code, relating to offenses and forfeitures under Taxation and Finance." 14 V.I.C. § 604(e)(37).

Count 75 identifies Counts 1, 2, 3, 15, 27, 39, and 55-60 as constituting the pattern of criminal activities. Defendants contend that Counts 55-60 do not constitute proscribed criminal activities under 14 V.I.C. § 605(a), that Counts 1 and 2 are multiplicitous, and that Counts 3, 15, 27, and 39, alleging mail fraud based on mailing a false tax return should not be considered predicate acts for a racketeering offense under United States Department of Justice policy.

Counts 55 and 56 through 60 allege violations of 33 V.I.C. §§ 1522 and 1525(2), respectively, both of which relate to tax offenses. Therefore, they constitute criminal activities for the purposes of 14 V.I.C. § 605(a). As discussed in Part I, with regard to Counts 1 and 2, multiplicity is not an issue that the Court reaches pretrial. Finally, the United States Department of Justice policy was formulated based on its interpretation of the parallel, but not identical federal statute, 18 U.S.C. § 1962(c), Racketeer Influenced and Corrupt Organizations Act (RICO). These two statutes are materially different in that the Virgin Islands statute expressly includes tax offenses as a predicate criminal activity and the federal statute does not. Thus, even if the United States Department of Justice policy were binding, it would not be binding as to a prosecution under the Virgin Islands statute, 14 V.I.C. § 605(a).

VI. Motion to Dismiss Counts 53, 54 and 77 for Failure to State Claims under 31 U.S.C. § 5324(a)(3) and (d)(2).

In Counts 53, 54, and 77, Waheed Hamed, Maher Yusuf, and Nejeh F. Yusuf, respectively, are charged with structuring financial transactions in violation of 31 U.S.C. § 5324(a)(3) and (d)(2) and 18 U.S.C. §§ 2 and 3551 *et seq*. Section 5324(d)(2) is a sentence enhancement provision which provides: "Whoever violates this section while violating another law of the United States or as part of a pattern of any illegal activity involving more than $100,000 in a 12-month period shall be fined twice the amount provided in subsection (b)(3) or (c)(3) (as the case may be) of section 3571 of title 18, United States Code, imprisoned for not more than 10 years, or both." Counts 53 and 54 charge Waheed Hamed and Maher Yusuf, with violating another law of the United States, to wit 18 U.S.C. § 1956(h), which is money laundering. The money laundering is premised on the proceeds of the mail fraud allegedly committed by mailing false tax returns. As discussed in dismissing Counts 44 through 52, tax savings through tax evasion does not constitute a proceed under the money laundering statute. Accordingly, the reference to 18 U.S.C. § 1956(h) in Counts 53 and 54 is stricken.

VII. Motion to Dismiss Criminal Forfeiture Allegation 1 for Failure to State a Claim under 18 U.S.C. § 982

Defendants move to dismiss Criminal Forfeiture Allegation 1 as not identifying proceeds or how such proceeds were used to acquire the property identified. Rule 7(c)(2) of the Federal Rules of Criminal Procedure requires only that "the indictment . . . provide[] notice that the defendant has an interest in property that is subject to forfeiture in accordance with the applicable statute." "Barebones pleading suffices so long as it puts the defendant on notice that the government seeks forfeiture and identifies the assets subject to forfeiture with sufficient specificity to permit the defendant to marshal evidence in their defense." *United States v. Cauble*, 706 F.2d 1322, 1347 (5th Cir. 1983). As long as the indictment alleges the "extent of the interest or property subject to forfeiture," it is sufficient. *United States v. Boffa*, 688 F.2d 919, 939 (3d Cir. 1982) (quotation omitted).

Criminal Forfeiture Allegation 1 identifies each piece of property subject to forfeiture and the connection between the property and criminal activity. However, Counts 66 through 71 connect the property for which the Government seeks forfeiture to violations of 18 U.S.C. § 1956 – money laundering. In Part III, the Court held that the money laundering counts cannot stand because a tax savings cannot be considered a "proceed" of the illegal activity of mail fraud. Accordingly, the Court also dismisses Counts 66 through 71 of Criminal Forfeiture Allegation 1.

VIII. Motion to Dismiss Criminal Forfeiture Allegation 2 for Failure to State Claims under 14 V.I.C. § 606.

Title 14 V.I.C. § 606 is the territorial criminal forfeiture statute. Defendants' posit that since Counts 75 and 76, the CICO counts, should be dismissed and Criminal Forfeiture Allegation 2 falls in the absence of these counts, Criminal Forfeiture Allegation 2 must be dismissed. The counterpoint holds true here. Because the Court dismissed neither Count 75 nor Count 76, there is no reason for the dismissal of Criminal Forfeiture Allegation 2.

IX. Motion to Dismiss the Conspiracy Counts as Insufficiently Pled

Defendants move the Court to dismiss the remaining conspiracy counts as insufficient to apprise them of the charges against them.

> An indictment is generally deemed sufficient if it: 1) contains the elements of the offense intended to be charged, 2) sufficiently apprises the defendant of what he must be prepared to meet, and 3) allows the defendant to show with accuracy to what extent he may plead a former acquittal or conviction in the event of a subsequent prosecution. It is equally well established that no greater specificity than the statutory language is required so long as there is sufficient factual orientation to permit the defendant to prepare his defense and to invoke double

> jeopardy in the event of a subsequent prosecution.

United States v. Rankin, 870 F.2d 109, 112 (3d Cir. 1989).

The Court has reviewed the conspiracy counts and finds that they meet the level of specificity required by the Third Circuit Court of Appeals.

X. Conclusion

For the foregoing reasons, Defendants' Motion to Strike Counts from the Third Superseding Indictment is denied, except for the money laundering counts, Counts 2 and 44-52 which are dismissed, as well as Counts 66 through 71 of Criminal Forfeiture Allegation 1. In addition, the reference to 18 U.S.C. § 1956(h) in Counts 53 and 54 is stricken.

ENTER:

DATED: February 13, 2007 /s/ *Raymond Finch*
RAYMOND L. FINCH
DISTRICT JUDGE

ATTEST:
Wilfredo F. Morales
Clerk of Court

by: /s/ *Margaret Brown*
Deputy Clerk

cc: Magistrate Judge
Geoffrey W. Barnard
Nelson L. Jones, AUSA
David Ignall, Esq.
(fax) – (202) 514-0961
Pamela Colon, Esq.
719-7700
Henry C. Smock, Esq.
777-5758
Gordon Rhea, Esq.
(843) 216-6509
Thomas Alkon, Esq.
773-4491
Derek M. Hodge, Esq.
774-3981
John K. Dema, Esq.
773-3944
Randall Andreozzi, Esq.
(716) 565-1920

**IN THE DISTRICT COURT
OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX**

UNITED STATES OF AMERICA and GOVERNMENT OF THE VIRGIN ISLANDS, Plaintiffs, v. FATHI YUSUF MOHAMMED YUSUF, WALEED MOHAMMED HAMED, WAHEED MOHAMMED HAMED, MAHER FATHI YUSUF, ISAM MOHAMAD YOUSUF, and UNITED CORPORATION, dba Plaza Extra Supermarkets, Defendants.	CRIM NO. 2005-0015

ORDER

(Filed Feb. 13, 2007)

THIS MATTER comes before the Court on Defendants' Motion to Strike Counts from the Third Superseding Indictment. Defendants seek dismissal of Counts 1, 22, 55 and 76 as multiplicitous; Counts 3 through 43, 44 through 52, as both failing to state claims under the respectively charged statutes and contrary to the Department of Justice policy; Counts 53, 54, 56 through 74, 75 and 77 and Criminal Forfeiture Allegations 1 and 2 as failing to state claims under the respectively charged statutes; and the

conspiracy counts as insufficiently pled. The Government opposes such motion. A hearing was held on such motion on June 6, 2005.

For the reasons stated in the accompanying Memorandum Opinion, it is hereby

ORDERED that the Motion is **DENIED,** except for the money laundering counts, Counts 2 and 44-52, as well as Counts 66 through 71 of Criminal Forfeiture Allegation 1, which are **DISMISSED** and the reference to 18 U.S.C. § 1956(h) in Counts 53 and 54 which is **STRICKEN**.

ENTER:

DATED: February 13, 2007 /s/ *Raymond L. Finch*
RAYMOND L. FINCH
DISTRICT JUDGE

ATTEST:
Wilfredo F. Morales
Clerk of Court

by: /s/ *Margaret Brown*
Deputy Clerk

cc: Magistrate Judge
Geoffrey W. Barnard
Nelson L. Jones, AUSA
David Ignall, Esq.
(fax) – (202) 514-0961
Pamela Colon, Esq.
719-7700
Henry C. Smock, Esq.
777-5758
John K. Dema, Esq.
773-3944
Randall Andreozzi, Esq.
(716) 565-1920

Gordon Rhea, Esq.
(843) 216-6509
Thomas Alkon, Esq.
773-4491
Derek M. Hodge, Esq.
774-3981

NOT FOR PUBLICATION – NOT PRECEDENTIAL

IN THE DISTRICT COURT
OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

UNITED STATES OF AMERICA and GOVERNMENT OF THE VIRGIN ISLANDS, Plaintiffs, v. FATHI YUSUF MOHAMMED YUSUF, WALEED MOHAMMED HAMED, WAHEED MOHAMMED HAMED, MAHER FATHI YUSUF, ISAM MOHAMAD YOUSUF, and UNITED CORPORATION, dba Plaza Extra Supermarkets, Defendants.	CRIM NO. 2005-0015

MEMORANDUM OPINION

(Filed Jun. 25, 2007)

Finch, J.

THIS MATTER comes before the Court on the Government's Motion for Reconsideration. The United States of America moves for reconsideration from that part of the Court's February 13, 2007 Memorandum Opinion (#689) and Order (#690) that dismissed Counts 2 and 44-52, dismissed paragraphs 66-71 within Criminal Forfeiture Allegation 1, and

struck the reference to 18 U.S.C. § 1956(h) in Counts 53 and 54. This part of the Court's ruling was predicated on the Court's holding that the term "proceeds" as used in the money laundering statute, 18 U.S.C. § 1956(a)(2)(B)(i), "does not contemplate profits or revenue indirectly derived . . . from the failure to remit taxes." Mem. Op., dated Feb. 13, 2007, at 6 (quoting *United States v. Maali*, 358 F. Supp.2d 1154, 1160 (M.D. Fla. 2005)).

The Government raises the issue in its Motion for Reconsideration as to whether United Corporation's funds, in the possession of the individual Defendants, Fathi Yusuf and Waleed Hamed, without having been distributed or paid, constitute "proceeds" for purposes of the money laundering statute.

United Corporation is a closely held corporation of which Fathi Yusuf is a 32.5% shareholder. Waleed Hamed is not a shareholder. Relying on *Kann v. C.I.R.*, 210 F.2d 247, 251 (3d Cir. 1954), the Court finds that any funds held by Fathi Yusuf, as a controlling shareholder of United Corporation, absent any allegation that Fathi Yusuf intended to steal from United Corporation or the other shareholders, do not constitute embezzled income. Thus, the money that Fathi Yusuf held was money that was legally obtained through the operation of United Corporation and was not criminally held by him. Saving legitimately-earned money by mailing a false individual tax return, does not change the nature of the money retained to money illegally obtained for the purposes of the money laundering statute.

Waleed Hamed, on the other hand, not being a shareholder of United Corporation, but only a salaried employee, had no right to possess funds of United Corporation, except the money paid to him as compensation. In his possession, funds diverted from United Corporation could represent embezzled funds. The proceeds of the mail fraud would not therefore be tax savings on legally obtained funds, but the retention of embezzled funds. Mailing of false individual tax returns that do no [sic] report embezzled funds, but rather conceal these embezzled funds, and transporting and transferring such proceeds outside the United States would constitute money laundering in violation of 18 U.S.C. § 1956(a)(2)(B)(i).

However, the Third Superseding Indictment does not allege that Waleed Hamed embezzled any funds from United Corporation or otherwise obtained the funds from United Corporation without United Corporation's leave. In fact, the Third Superseding Indictment alleges to the contrary, that United Corporation specifically endorsed Waleed Hamed's control of such funds, in a scheme to reduce its tax obligation. There is no allegation that it was criminal for Waleed Hamed to possess such funds. Therefore, the money retained by Waleed Hamed by mailing a false individual tax return was not money illegally obtained or "proceeds" for the purposes of the money laundering statute, but rather, tax savings.

For the foregoing reasons, the Court denies the Government's Motion for Reconsideration.

ENTER:

DATED: June 25, 2007 /s/ *Raymond L. Finch*
RAYMOND L. FINCH
DISTRICT JUDGE

ATTEST:
Wilfredo F. Morales
Clerk of Court

by: /s/ *Nydia Hess*
Deputy Clerk

cc: Magistrate Judge
Geoffrey W. Barnard
Nelson L. Jones, AUSA
Mark F. Daly
(202) 616-1786
Pamela Colon, Esq.
719-7700
Henry C. Smock, Esq.
777-5758
Gordon Rhea, Esq.
(843) 216-6509
Thomas Alkon, Esq.
773-4491
Derek M. Hodge, Esq.
774-3981
John K. Dema, Esq.
773-3944
Randall Andreozzi, Esq.
(716) 565-1920
Warren B. Cole, Esq.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 07-3308

UNITED STATES OF AMERICA;
GOVERNMENT OF THE VIRGIN ISLANDS,

Appellants

v.

FATHI YUSUF MOHAMMED YUSUF a/ka [sic] FATHI YUSUF; WALEED MOHAMMED HAMED a/k/a WALLY HAMED; WAHEED MOHAMMED HAMED a/k/a WILLIE YUSUF; MAHER FATHI YUSUF a/k/a MIKE YUSUF; ISAM MOHAMAD YOUSUF a/k/a SAM YOUSEF; UNITED CORPORATION, d/b/a PLAZA EXTRA; NEJEH FATHI YUSUF

Before: SCIRICA, *Chief Judge*,
SLOVITER, McKEE, RENDELL, BARRY,
AMBRO, FUENTES, SMITH, FISHER,
CHAGARES, JORDAN, HARDIMAN,
NYGAARD* and ROTH*, *Circuit Judges*

The petition for panel rehearing and rehearing *en banc* filed by the Appellees in the above-entitled case

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* Judge Nygaard's vote and Judge Roth's vote are limited to panel rehearing only.

having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court *en banc*, the petition for rehearing is denied.

By the Court,

/s/ JANE R. ROTH
Circuit Judge

Dated: September 2, 2008

CH/cc: Gordon C. Rhea, Esq.
Henry C. Smock, Esq.
Randall P. Andreozzi, Esq.
Pamela L. Colon, Esq.
John K. Dema, Esq.
Derek M. Hodge, Esq.
Thomas Alkon, Esq.
S. Robert Lyons, Esq.
Alan Hechtkopf, Esq.